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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, et al.,
Petitioners,

v.

THE CITY OF MAYFIELD HEIGHTS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipality denies condominium homeowners equal protection under the Fourteenth Amendment where the municipality provides the tax supported benefit of waste collection and disposal for single and double family homeowners but denies this benefit to single family homeowners who own condominiums.

II. Whether a court of appeals may hypothesize or conceptualize facts to support an equal protection rational basis scrutiny of an administrative municipal policy.

III. Whether a court of appeals may, on its own initiative, deny condominium homeowners all municipal services except fire and police, including services such as provided by the health department, building department, department on aging and recreation department.

IV. Whether a court of appeals may usurp the accepted maxims of appellate court power to overturn and modify the findings of fact made by a district court judge.

PARTIES TO THE PROCEEDINGS

Petitioners

Woodhawk Club and Woodhawk II, the petitioners are nonprofit corporations with no parent companies and with no subsidiaries. The petitioners are sometimes hereinafter jointly referred to as "Woodhawk."

Respondent

The City of Mayfield Heights, Ohio, a municipal corporation is the respondent. The respondent is sometimes hereinafter referred to as the "City."

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The Woodhawk Club Condominium Owners Association and Woodhawk Club Condominium II Owners Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit on this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth District is unpublished. A copy is included in the Appendix A. The opinion of the United States Court of Appeals for the Sixth District denying the petition for rehearing en banc is unpublished. A copy is included in the Appendix C. The opinion of the United States District Court for the Northern District of Ohio is unpublished. A copy is included in the Appendix at B.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion of February 3, 2000. On February 17, 2000, Petitioner filed a petition for rehearing en banc which was denied on March 24, 2000. The petition for writ of certiorari is filed within ninety days of the denial of the petition for rehearing en banc. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution Article I § 2 provides:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

STATEMENT OF THE CASE

The respondent provides the tax supported service of garbage collection and disposal to all single and double family homeowners within its borders but denies this service to those single family homeowners who own a condominium. Woodhawk brought this action to enjoin the respondent's discriminatory action.

The district court agreed with Woodhawk and found that the respondent's "policy of refuse collection and disposal

[was] unconstitutional and null and void to the extent it denies [Woodhawk] equal protection under the law." Appendix B, pg. 25a. The respondent was "restrained and enjoined from further failing, refusing or neglecting to pick up and collect [Woodhawk's] refuse." Appendix B, pg. 25a.

At the trial, the respondent argued that there was an agreement or contract between the developer [not Woodhawk] and that the City provided for a waiver of certain building code restrictions in exchange for a waiver of refuse collection and disposal. Thus, Woodhawk was an third party beneficiary of the alleged agreement. This issue was tried, testimony was taken, documents were admitted into evidence, and oral arguments presented.

The district court found "no contractual agreement between the condominium members or the association and the City that would obligate [Woodhawk] to pay these refuse costs." Appendix B, pg. 23a. The district court found no evidence in any documents including Woodhawk's Declaration or the Planning Commission minutes to support the respondent's arguments. Appendix B, pgs. 22a-23a.

The respondent appealed to the Sixth Circuit Court of Appeals. The court of appeals overturned an express determination of fact made by the district court and reversed the district court's decision. The court of appeals based its decision upon one line of testimony from the former mayor of Mayfield Heights. He testified, "Those are the two services [i.e. police and fire] that we do give to private developments or multifamily developments." Appendix A, pg. 10a. From this testimony, the court of appeals determined that the district court's findings of fact were clearly erroneous and stated, "It is clear that if fire and police service are the only two City functions provided to Woodhawk, then all other services,

including garbage collection, are not provided." Appendix A, pg. 10a. Note that the former mayor did not state that there was an agreement between the developer and the respondent. He simply testified that this was the way they always did it.

Woodhawk filed a petition for rehearing en banc which was denied on March 24, 2000. Appendix C, pg. 27a.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. The equal protection clause demands no less. The court of appeals decision, which overturns the district court's decision following a trial on the merits, allows municipalities to discriminate against single family homeowners who own condominiums in favor of other single family residences who do not own condominiums.

BACKGROUND

Pursuant to its administrative policy, the respondent confers the benefit of tax supported service of garbage collection and disposal to all single and double family homeowners within its borders. Condominium homeowners whose residences abut private roadways are excluded from receiving this tax supported benefit. When a municipality distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The respondent's administrative

policy should survive scrutiny only if the distinction it makes rationally furthers a legitimate municipal interest.

The respondent creates a classification between condominium homeowners and non-condominium homeowners for the purpose of distributing the tax supported service of garbage collection and disposal. This classification is not rationally related to the respondent's expressed purpose of keeping its residents safe, does not promote efficient sanitation and has no impact on the respondent's potential liability for injury or damages incurred during the performance of garbage collection.

The respondent's argument that the Woodhawk homeowners are third party beneficiaries of a contract between the respondent and the developer fails for two reasons. First, the trial court found after a trial on the merits that there is no contract from which the respondent and the developer intended the Woodhawk homeowners to benefit. Second, if such a contract existed, then the Woodhawk homeowners would be obligors (having to pay for private refuse collection where other homeowners enjoy the tax supported service of refuse collection), rather than beneficiaries. This court analyzed policies conferring benefits upon citizens in Zobel v. Williams, 457 U.S. 55; 102 S.Ct. 2309; 72 L.Ed.2d 672 (1982) and Hooper v. Bernalillo County, 472 U.S. 612; 105 S.Ct. 2862; 86 L.Ed.2d 487 (1985). Since the issue in the instant matter concerns the constitutionality of a municipality providing benefits unequally, the analyses of Zobel and Hooper control.

This Court defined the level of required scrutiny as follows:

> When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose.

Zobel, 457 U.S. at 60; Hooper at 472 U.S. at 618.

Applying this standard to the instant matter, the respondent's discriminatory policy survives Constitutional scrutiny only if this discrimination which confers benefits on one set of homeowners but denies them to other homeowners similarly situated, furthers a legitimate municipal interest.

Instead of applying Zobel and Hooper, the court of appeals perpetuated a new standard first created by the eleventh circuit in the case of Beauclerc Lakes Condominium Assoc. v. Jacksonville, 115 F.3d 934 (11th Cir. 1997). If allowed to continue, Zobel and Hooper will be replaced by a standard which authorizes a court of appeals to determine whether a conceivably rational basis exists to believe that governmental action could further a hypothesized purpose.

The court of appeals overturned the district court's finding of fact, determining that the trial court committed clear error. The court of appeals determined that the developer and the respondent entered into a contract. Even if this were true, which it is not, then by allowing the decision to stand necessarily means that a governmental entity can practice discriminatory policies if the entity and a third party agree.

The court of appeals allows municipalities across the country to discriminate against condominium homeowners by

denying them certain services they provide other non-condominium homeowners. Municipalities no longer must justify their discriminatory distinction with a legitimate state interest. Now they only need a "hypothesized" purpose.

There is no realistic prospect of the resolution of this problem without the decision of this Court.

LAW AND ARGUMENT

A. The respondent denies Woodhawk homeowners equal protection under the Fourteenth Amendment and Article 1 Section 2 of the Ohio Constitution because it provides the tax supported benefit of waste collection for single and double family homeowners but denies this benefit to single family homeowners who own condominiums.

B. The court of appeals may not hypothesize and conceptualize facts to support an equal protection rational basis scrutiny of the respondent's policy decision.

The United States Supreme Court defines the accepted maxim:

> When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the equal protection clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state interest.

Zobel v. Williams, 457 U.S. at 60 (1982); Hooper v. Bernalillo County, 472 U.S. at 618 (1985).

The court of appeals in the instant matter did not apply the standard promulgated by the United States Supreme Court. The court of appeals applied a decision from the eleventh circuit, Beauclerc Lakes Condominium Assoc. v. Jacksonville, 115 F.3d 934 (11th Cir. 1997) which is inconsistent with the Zobel and Hooper standards.

Instead of determining whether the distinction the respondent makes rationally furthers a legitimate state purpose, the court of appeals applied the eleventh circuit's test to determine whether "a rational basis exists to believe that the government action would further a hypothesized purpose. Beauclerc at 115 F.3d 935." (Emphasis added.) Appendix A, pg. 8a. This inquiry has been described as determining whether a "conceivably rationale basis exists, not whether the basis was actually considered by the legislative body." Id.

A municipality, per the court of appeals, no longer must justify its discriminatory practices by showing the distinction furthers a legitimate state interest. Now they must merely show a court of appeals that a conceivably rational basis exists to believe that the governmental action would further a hypothesized purpose.

The court of appeal's decision places its equal protection analysis of municipal administrative decision in a unique and dangerous position contrary to the United States Supreme Court mandates. It allows a circuit court of appeals to hypothesize and conceptualize, rather than determine if a district court's decision is clearly erroneous. Anderson v. City of Bessemer, 470 U.S. 564 (1985).

The court of appeal's decision is contrary to previous decisions of the Sixth Circuit. The case of Bannum, Inc. v. City of Louisville, 958 F2d 1354 (6th Cir. 1991) involved the application of the rational relationship test to an equal protection challenge of a municipal zoning ordinance. The Sixth Circuit stated that ". . . zoning decisions are reviewed to determine whether the classifications drawn by the regulations are rationally related to a legitimate interest of the state or municipality." Id. at 1360.

> If the City's goal was to protect its residents from recidivists, then some data reflecting the extent of the danger must exist in order to render the different treatment of CTCs rationally related to that goal. The rational relationship standard is not met when the classification relied upon by the legislative authority is 'so attenuated as to render the distinction arbitrary or irrational.' City of Cleburne, 473 U.S. at 446, 105 S.Ct. at 3258 (citing Zobel v. Williams, 457 U.S. 55, 61-63, 102 S.Ct. 2309, 2313-14, 72 L.Ed.2d 672 (1982); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 535, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973).

Bannum at 1360-1361.

The Sixth Circuit in Bannum did not hypothesize facts in order to create a rational basis. It relied upon the U.S. Supreme Court's mandate in Zobel, that the rational relationship standard is not met when the classification relied upon "so attenuated as to render the distinction arbitrary or irrational."

In the instant matter, if the respondent's goal was fiscal responsibility, then the distinctions between condominium homeowners and all other single-family homeowners are subject to scrutiny. These distinctions must rationally further the respondent's goal of fiscal responsibility. However, The court of appeals hypothesized a rational basis in order to take the case out of the equal protection analysis and into an estoppel argument. The court of appeals used the "could have considered" and hypothesized facts that the trier of fact specifically found did not exist.

C. The court of appeals decision requires the respondent to provide only fire and police services and denies, to condominium homeowners, all other municipal services such as those provided by the health department, the building department and department on aging.

The court of appeal's decision creates a new issue of exceptional importance. The respondent may now deny all municipal, tax supported services to condominium homeowners at Woodhawk, except fire and police. The court of appeal's decision permits a denial of other municipal services to condominium homeowners such as the services provided by the health department, the building department, the recreation department and department on aging. The impact of this decision is so overwhelming that the errors described above are compelling.

This result is the consequence of the circuit court hypothesizing facts. The circuit court does not have the luxury of hearing all the testimony, reviewing all the documents, and observing the credibility of witnesses.

If discriminatory practice is legitimized by historical usage, then there could be no prohibition of discrimination. The court of appeals elevates the respondent's argument, "we *always did it this way" to levels of acceptance* never before recognized by the courts of this land. This country would still be mired in discriminatory practices long ago decried as violative of the Unites States Constitution.

D. The court of appeals decision is contrary to accepted standards of appellate review and usurps the accepted maxims of appellate court power to overturn and modify the findings of fact made by a district court judge.

The United States Supreme Court states:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

Anderson at 470 U.S. 573.

> If the District Court's account of the evidence is plausible in light of the record viewed in its entirely, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there

> are two permissible views of the evidence the fact finder's choice between them cannot be clearly erroneous.

Id. 573-574.

The court of appeal's decision found that the district court's finding of fact that the agreement did not include garbage services was clearly erroneous. Appendix A, pg. 9a. The court of appeals bases this upon two factors. The first factor is the testimony of former Mayor DeJohn, that fire and police services are two services that are given to private developments or multi-family developments. Secondly, the court of appeals overturned the district court's finding of fact based upon a notification of homeowners that the garbage removal will be a common area expense as set forth in the required disclosure statements.

The court of appeals ignores the other testimony and evidence, and substitutes its preferred decision for the district court's finding of fact.

The court of appeals uses both of these reasons to find the district court's decision was clearly erroneous in order to determine the respondent's "conceivably rationale basis" for meeting its cost containment goal.

The Supreme Court further states:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and

> with experience in fulfilling that role comes expertise.

Id. at 574.

When findings are based on determinations regarding the credibility of witnesses:

> Rule 52(a) demands even greater deference to the trial court's findings for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Id. at 574-575.

The court of appeals did not explain how a developer can bind a condominium association to an implied contract, even if one did exist. However, the district court reviewed and rejected the various theories advanced by the respondent. Appendix B, pgs. 22a-23a.) Woodhawk is not a third party beneficiary. There is no language in the declaration sufficient to create an obligation. It does disclose that collection and disposal of garbage is a cost the Woodhawk members must bear, but disclosure of an unlawful act cannot make it otherwise lawful.

The court of appeal's decision supports the theory that unlawful conduct is made lawful by mere publication. The developer had to disclose the garbage refuse as a line item in a proposed budget because the respondent would not pick up the garbage. This does not condone the respondent's actions, nor is evidence of an agreement.

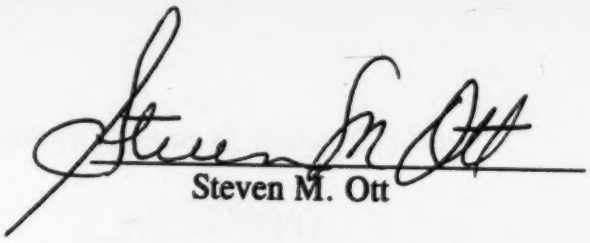
The court of appeals took two lines from the entire trial and determined that the district court's specific finding of fact based upon the entire transcript, was clearly erroneous.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. Otherwise, the Supreme Court's teachings of Zobel v. Williams, 457 U.S. 55 (1982) and Hooper v. Bernalillo County, 472 U.S. 612 (1985) will be undercut, lower courts will be permitted to hypothesize facts to create a rational basis for equal protection acceptance and the court of appeals will usurp accepted maxims of appellate power to overturn and modify findings of fact made by the district court. The net effect will be the continued discriminatory conduct directed toward condominium homeowners.

The court of appeal's decision is inconsistent with established United Supreme Court decisions and creates dangerous precedent. The court of appeals decision changes the equal protection analysis mandated by Zobel and Hooper. The consequence results from the court of appeals failing to apply the appropriate review of determination of fact, as set forth in Anderson v. City of Bessemer, 470 U.S. 564 (1985). Supreme Court guidance is needed.

Respondent respectfully requests that this Court grant this Petition for a Writ of Certiorari so that arguments may be fully presented to put a stop to the discrimination practiced by the respondent and prohibit any court of appeals from hypothesizing facts to support a rational basis inquiry.



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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed February 3, 2000]

No. 98-4163

THE CITY OF MAYFIELD HEIGHTS, ET AL., *Defendants-Appellants*	)
v.	)
THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOC., ET AL., *Plaintiffs-Appellees.*	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT AKRON

OPINION

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and BERTELSMAN, District Judge.*

PER CURIAM. Defendant-Appellant City of Mayfield Heights appeals a decision in which the district court determined that the City's failure to collect garbage from the Woodhawk Condominium complex did not amount to a policy that was rationally related to a legitimate government interest. For the reasons stated below, we REVERSE.

FACTUAL BACKGROUND

The City of Mayfield Heights is a municipal corporation organized and existing under the laws of the State of Ohio. The City is an eastern suburb of Cleveland with approximately twenty thousand residents. The City's housing stock comprises approximately five thousand single-family homes with a few two-family residences. The remaining five thousand dwellings consist of multi-family condominium developments and apartments.

Margaret A. Egensperger is the duly elected Mayor and Safety Director of the City, who controls and supervises all departments and divisions of the City's administration. Andrew Fornaro is the Service Director for the City who, before the privatization of garbage collection and removal, was responsible for directing the collection and removal of

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* The Honorable William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

garbage for the City. Ross C. DeJohn is the former Mayor and Safety Director of the City who served as such from 1966 to 1994.

Appellees Woodhawk Club and Woodhawk II are not-for-profit Ohio corporations. Woodhawk Club provides a corporate entity owned by two hundred thirty-six condominium unit owners. Woodhawk II provides the same structure for seventy-two condominium unit owners. Woodhawk Club and Woodhawk II are located in the City of Mayfield Heights, Ohio. For the sake of convenience, the two organizations will be referred to collectively as "Woodhawk." The Woodhawk development can be fairly characterized as an upscale community comprised primarily of "empty nesters." The streets in Woodhawk are concrete, but their rights-of-way are narrower than that of the typical City street. Woodhawk's streets were never dedicated to public use. Sidewalks are lacking on some of the Woodhawk streets, and, where sidewalks are present, there are no tree lawns (grassy strips) between the walkway and the roadway.

In the 1960's the City, through Mayor DeJohn, adopted an administrative policy to provide for the collection and disposal of garbage from all single and duplex residences. This service is supported by public taxes. At or about the same time, the City adopted a policy denying garbage collection to condominium developments that did not directly abut publicly dedicated roadways within the City.

Woodhawk's developer, Zaremba Woodhawk Company, approached the City for approval of the complex in 1980. The City's initial consideration was whether or not to grant a request for a zoning variance for the property from

a Single-Family Residence Classification to Multi-Family Development Classification. Zaremba ultimately received a zoning variance.

The developer next requested an exemption from the City's Building Code Standards regarding building setbacks from roadways, exclusion of sidewalks and tree lawns, and reduction of right-of-way width requirements. In the Planning and Zoning Commission Minutes of March 3, 1980, the City agreed to the exemptions in exchange for assurances by Zaremba that Woodhawk would be a "private, gated community without the need for City maintenance services."

Ohio Revised Code § 5311.26 requires that condominium developers provide a disclosure statement to prospective owners which details all material circumstances or features affecting the purchase of such a unit. In that disclosure under § I(3) "Other Contracts that Affect the Condominium Development," Zaremba disclosed that: "as the units and other improvements near completion, the developer will be entering into other contracts on behalf of the condominium development such as contracts for snow removal, landscaping, garbage removal, exterminating, etc., the same will be set forth on Exhibit 'E' of this disclosure statement." (Disclosure Statement for the Woodhawk Club Condominium, Joint Apdx. p. 353, 369).

Schedule "B" of the same document summarizes annual and monthly costs of garbage removal for the first two years of the development. (Annual and Monthly Expenditures by Category for Common Area Expenses, Joint Apdx. p. 379). Under "budget assumptions" in Schedule "B," the disclosure indicates that garbage removal costs are based on

an estimate from Browning-Ferris Industries, a private garbage hauler. Id. p. 381.

In addition, Mayfield Heights's Ordinance § 1357.05 requires that this same disclosure be filed with the City before its use for any promotional purposes. (City of Mayfield Heights Building and Housing Code, § 1357.05 Public Offering Statement, Joint Apdx. p. 590). All indications from the record are that Zaremba filed this disclosure as required.

Through the above requirements, prospective unit owners at Woodhawk are advised of all maintenance costs, including garbage collection and removal, before purchasing a Woodhawk condominium. The unit owners' knowledge of their expenses is also disclosed to them through recorded filings of the Declaration of Condominium Property and deed covenants and restrictions. These documents show that garbage removal is part of the unit owners' financial responsibility.

In 1989, Wesley G. Schmidt, a unit owner in Woodhawk, demanded that the City collect Woodhawk's garbage. Indeed, Schmidt threatened the City with litigation if this demand was not promptly met. Additional requests were made by Schmidt and others for the City to begin providing garbage collection service. The City consistently denied all requests to commence garbage collection at Woodhawk.

Woodhawk finally filed suit in the United States District Court for the Northern District of Ohio at Akron on July 1, 1997. Mediation was scheduled for July 21, 1998. The case was returned to the district court for further

processing on July 28, 1998. A bench trial was held on August 11, 1998. Proposed Findings of Fact and Conclusions of Law issued on August 17, 1998. Final Judgment for Woodhawk was entered August 26, 1998.

The court found that the City's garbage collection policy was unconstitutional under the Equal Protection Clause of the Constitution of the United States as incorporated by the 14th Amendment.

The City, its mayor, and other officers were restrained and enjoined from refusing to collect garbage from Woodhawk. The City was ordered to commence garbage collection within three months from date of entry of Judgment. Finally, Woodhawk was awarded $26,000 in damages as a result of the City's unconstitutional actions. This timely appeal followed on September 22, 1998.

JURISDICTION OF THE COURT

District court jurisdiction was proper as the constitutional issue in this case raised a federal question. 28 U.S.C. § 1331. Appellate jurisdiction is based upon 28 U.S.C. § 1291.

STANDARD OF REVIEW

In a bench trial, the district court's conclusions of law are reviewed de novo. Kline v. Tennessee Valley Authority, 128 F.3d 337, 341 (6th Cir. 1996). This court reviews a district court's findings of fact under the clearly erroneous standard of review. Id. A finding of fact will only be clearly erroneous when, although there may be some evidence to

support the finding, the "reviewing court is left with the definite and firm conviction that a mistake has been committed." Id.

THE MERITS

I. THE GARBAGE COLLECTION POLICY SHOULD BE ANALYZED USING RATIONAL-BASIS REVIEW.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." Cutshall v. Sundquist, 193 F.3d 466, 482 (6th Cir. 1999) (internal citations omitted).

> The general rule in equal protection analysis is that state action is presumed to be valid and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest (citation omitted). [W]here a state classifies by race, alienage, or national origin, or where a state impinges on personal rights protected by the Constitution; such action is subjected to strict scrutiny and will be sustained only if narrowly tailored to serve a compelling state interest.

Valot v. Southeast Local School District Board of Education, 107 F.3d 1220, 1229 (6th Cir. 1997). Woodhawk has stipulated that garbage collection and removal is not a suspect classification under Equal Protection Clause jurisprudence. The distinction drawn by the City in this case centers on ownership of a certain type of residence, "which is not among

the 'suspect classifications' recognized by the courts." Beauclerc Lakes Condominium Assoc. v. City of Jacksonville, 115 F.3d 934, 935 (11th Cir. 1997).

Woodhawk has also stipulated that no fundamental right is involved in this dispute. That stipulation was correct; the right to free waste collection is not a fundamental fight. Id.; See Goldstein v. City of Chicago, 504 F.2d 989, 991-92 (7th Cir. 1974) (denying claimed violation of Equal Protection Clause by condominium owners based on provision of free garbage collection to single-family residences). Therefore, rational-basis review applies in this case.

Rational-basis review requires a two-step process. First, one must identify "a legitimate government interest the enacting government body could have been pursuing." Beauclerc, 115 F.3d at 935. Second, one must determine whether a "rational basis exists to believe that the legislation would further the hypothesized purpose." Id. Each requirement will be analyzed in turn.

A. The City's goal of controlling the costs associated with garbage collection is a legitimate government interest.

The legitimate government interest of the City was the promotion of efficiency in the collection of garbage in order to preserve scarce municipal resources. This Circuit has held that the "valid interest in conserving public and private financial resources is, standing alone, of sufficient weight to justify the City's Charter Amendment under a rational basis analysis. . . ." Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 301 (6th Cir.), cert.

denied, __ U.S. __, 119 S. Ct. 365, 142 L.Ed.2d 302 (1998). See also Edwards v. Valdez, 789 F.2d 1477 (10th Cir. 1986) (holding that ease of administration and preservation of the fiscal integrity of an unemployment program are legitimate government concerns).

Against this backdrop, control of the costs in the City's sanitation department amounts to a legitimate government objective. As to step one, then, the City has articulated a legitimate government interest.

B. The agreement between Zaremba and the City was a rational basis for meeting the government interest of containing garbage collection costs.

The second step in the rational-basis inquiry is to determine whether a rational basis exists to believe that the government action would further the hypothesized purpose. Beauclerc, 115 F.3d at 935. This inquiry has been described as determining whether a "conceivably rational-basis exists, not whether that basis was actually considered by the legislative body." Id.

Turning to our case, the City's conceivably rational basis for meeting its cost containment goal arose from its negotiations with Zaremba prior to approval of the development. In those discussions the City agreed to waive, *inter alia,* building setback requirements in exchange for Woodhawk's disclaiming any City maintenance services. The district court found as a fact that this agreement did not include garbage services. This finding was clearly erroneous for two reasons.

First, the testimony of former Mayor DeJohn established that only two City services were to be provided to Woodhawk:

> Q: Okay. Tell the Court if you will what occurs when a property owner makes an application to develop property and represents it will be in a private drive or private roadway kind of situation?
>
> A: Well, the building requirement of the buildings have [sic] to of course, be met. We go through a review of the plans of the roadways, parking areas. We scrutinize and have both fire department and police department review these plans to be sure that fire equipment can be executed and because of the size of the fire vehicles. *Those are the two services that we do give to private developments or multifamily developments.*

Transcript of DeJohn testimony, Joint Apdx. p. 237-238 (emphasis added). It is clear that if fire and police service are the only two City functions provided to Woodhawk, then all other services, including garbage collection, are not provided.

Second, Woodhawk residents knew and accepted from the outset that they would bear charges for snow removal, street repair, and garbage removal. The costs for these items are all classified as "common area expenses" in the Disclosure Statement, which is given to every prospective owner. These expenses are also detailed in the Declaration of

Condominium Ownership, which appears in the chain of title of every unit in the county recorder's office.

Acceptance of these items was part of the bargain that every unit owner struck with the developer. Indeed, all parties from the beginning knew that the absence of City maintenance services to Woodhawk meant that Woodhawk would not receive City garbage collection. Zaremba would not have taken the time and effort to include estimates of garbage collection costs in the required disclosures he filed unless he understood that the City would not collect garbage from Woodhawk. Moreover, the lack of City garbage collection to the development prompted the Woodhawk Owners Association to enter into a contract with a garbage hauler. Likewise, the individual residents would not pay a private hauler to collect their garbage if they expected the City to provide the garbage collection service.

Everyone with a stake in the Woodhawk development understood from the outset that the lack of City maintenance services implied the lack of garbage collection services. To the extent the language of the agreement was ambiguous, the interpretation placed on it over the years by Zaremba, the unit owners, and the City demonstrates that garbage collection was not included. Consequently, the district court clearly erred in holding that City maintenance services did not include garbage removal.

By establishing a *quid pro quo* with Zaremba, the City, avoided the extra expense of collecting garbage from a large development. Through these negotiations, the City was able to pursue its goal of cost containment in the provision of

garbage collection services. Therefore, there is a rational basis for the City to deny garbage collection to Woodhawk.

II. INDIVIDUAL UNIT OWNERS IN WOODHAWK WERE ON NOTICE THAT GARBAGE SERVICES WOULD NOT BE PROVIDED.

A basic element necessary to the transfer of real property is a state's Recording Act. Ohio's Recording Act provides, in pertinent part:

> 5301.25 RECORDING OF INSTRUMENTS FOR CONVEYANCE OR ENCUMBRANCE OF LANDS; NAME OF SURVEYOR
>
> (A) All deeds, . . . and instruments of writing properly executed for the conveyance or encumbrance of lands, . . . shall be recorded in the office of the county recorder of the county in which the premises are situated. . . .

OHIO REV. CODE ANN. § 5301.25 (Baldwin 1999).

The deeds for the Woodhawk units sold to individual purchasers were recorded pursuant to § 5301.25.

Ohio adds another recording requirement when the real property in question is a condominium development. The developer of a condominium must file a declaration as provided in Ohio Revised Code § 5311.06:

> 5311.06 RECORDING OF DECLARATION

> (A) A declaration of condominium property shall be filed and recorded in the office of the recorder of the county or counties in which the land or water slips described in the declaration are situated.
>
> *****
>
> C) No interest in a unit shall be conveyed until the declaration, bylaws, and drawings, certified as provided in this section, have been filed for record. Errors or omissions in the declarations, bylaws, or drawings do not affect the title of a grantee of a unit.

OHIO REV. CODE ANN. § 5311.06 (Baldwin 1999).

Zaremba filed a proper declaration of condominium ownership within which the estimated charges for garbage collection appeared. The Declaration of Condominium Ownership and By-Laws for Woodhawk Club is recorded at Volume 15622, Page 6, et seq. of the Cuyahoga County Deed Records. The Declaration of Condominium Ownership and By-Laws for Woodhawk II is recorded at Volume 93721, page 5, et seq., of the Cuyahoga County Deed Records.

If deeds and other instruments are properly recorded, then:

> Ohio has long abided by the principle that a purchaser of real property is charged with constructive notice of all prior conveyances [and encumbrances] recorded in

> his chain of title. Constructive notice is imputed notice which exists by reason of the proper filing of a conveying instrument. A purchaser of real property is obligated to exercise due diligence and thoroughly examine the chain of title to discover the existence of adverse claims or encumbrances.

Columbia Gas Transmission Corp. v. Bennett, 594 N.E.2d 1, 5-6 (Ohio Ct. App. 1990) (citations omitted).

All purchasers of units in Woodhawk were under an obligation to conduct or have conducted an examination of the chain of title of the unit that they were purchasing. Such an examination would have revealed the recorded Declaration of Condominium Ownership and the requirement for payment for garbage collection contained therein. Thus, those owners cannot now say that they are not bound by the agreement Zaremba made with the City, when they knew of the requirement to pay for private garbage collection before they entered into a purchase agreement for their condominium.

In addition, the residents benefitted from the arrangement. A waiver of setback requirements allowed Zaremba to build the condominium buildings closer together--which allowed for more units in the same amount of space. This increased density benefitted every owner, beginning with Zaremba. He could build more units to sell. Prospective individual unit owners were rewarded with a lower per unit cost for common expenses. This meant that any individual unit was more affordable. Current unit owners also profit from reduced common area expense because these lower costs make Woodhawk condominiums more attractive on the resale

market. These facts provide a further rational basis for the City's position herein.

CONCLUSION

The City of Mayfield Heights has a legitimate government interest in controlling municipal expenditures for garbage collection. A rational basis for controlling those costs was accomplished by the City's promise to waive building setback requirements for Woodhawk as long as Woodhawk agreed to be a private, gated community with no need for City services. Therefore, the City has not violated the Equal Protection Clause. Consequently, the decision of the district court is REVERSED with directions to enter judgment for defendants and to dismiss the complaint with prejudice.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed August 26, 1998]

No. 1:97-CV-1759

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, et al.,
Plaintiffs,

v.

CITY OF MAYFIELD HEIGHTS, et al.,
Defendants.

JUDGMENT

On the basis of the Complaint, Answer of the Defendants, Stipulations of Fact, Trial Briefs submitted, exhibits, and the evidence taken at the trial held on August 11, 1998, the Court finds as follows:

1. The Court has jurisdiction over this matter under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

2. Venue is properly in the Northern District of Ohio, Eastern Division pursuant to 28 U.S.C. § 1391, *et seq.*

3. Plaintiffs, Woodhawk and Woodhawk II are not-for-profit corporations organized and existing under the laws of the State of Ohio.

4. Woodhawk provides a corporate entity for two hundred thirty-six (236) condominium owners.

5. Woodhawk II provides a corporate entity for seventy-two (72) condominium unit owners.

6. Woodhawk and Woodhawk II are authorized under Ohio Rev. Code § 5311.20 to bring actions for and on behalf of such condominium unit owners.

7. Woodhawk and Woodhawk II are located in the City of Mayfield Heights, County of Cuyahoga, and State of Ohio.

8. Defendant, the City of Mayfield Heights, is a municipal corporation and political subdivision organized and existing under the laws of the State of Ohio.

9. Defendant, Margaret Egensperger, is the duly elected Mayor of the City of Mayfield Heights and controls and supervises all departments and divisions of the City's administration.

10. Defendant, Andrew Fornaro is the Service Director for the City of Mayfield Heights with responsibility

for directing the collection and disposal of refuse within the limits of the City.

11. Woodhawk Club and Woodhawk II are condominiums developed within the City of Mayfield Heights and organized sometime in the early 1980's.

12. The Declaration of Condominium Ownership and By-Laws for Woodhawk Club is recorded at Volume 15622, Page 6, et seq. of the Cuyahoga County Deed Records.

13. The Declaration of Condominium Ownership and By-Laws for Woodhawk II is recorded at Volume 93721, page 5, et seq. of the Cuyahoga County Deed Records.

14. The Court finds that at the time the developer proposed the development, the developer requested that certain land be rezoned from R-1 to U-3, which would support a condominium development.

15. The Court finds in making this application, detailed plans and other submissions were made to the City. These plans were revised over numerous times and discussed with the City and City representatives, including the police department, city engineers, fire department.

16. The Court funds these submissions were accepted by the City and that the development was thereafter approved by the City.

17. On March 3, 1980, the City Planning and Zoning Commission accepted the submission by the

developer. At that time, it was represented that the development would be private and would need no maintenance services from the City. The Court finds no specific reference in the Planning and Zoning Commission minutes that there was any discussion or representation that refuse service would be provided or requested.

18. The Court finds no other credible testimony that this was a topic of discussion between the parties at that time. As indicated, upon the receipt of the approval of the City construction began on the Woodhawk development.

19. The condominium documents as recorded in the Cuyahoga County records indicated that members of the condominium associations would bear the cost of refuse service.

20. The City adopted an administrative decision, under the direction of the Mayor and Service Director, that provides the tax-supported service of collection and disposal of refuse from all single and double family residences would be supported by tax funded receipts or it would be supported by public tax monies. The City under the direction of the Mayor and Service Director has failed and refused to provide the collection and disposal of rubbish from condominium residences that do not directly abut publicly dedicated roadways within the City.

21. Real property owners in the City of Mayfield Heights, including Woodhawk and Woodhawk II's residents, pay to the City real property taxes and income taxes. The City earmarks a percentage of those taxes for the general fund, from which the cost of refuse collection is paid.

22. The City currently and for approximately eight years has contracts with a private hauler to perform rubbish collection services.

23. Under this scheme, Woodhawk and Woodhawk II have been obligated to contract with private rubbish collection services to perform rubbish collection within the condominium developments. From at least 1989, the Plaintiffs in this case have made requests to the City to provide rubbish collection services. The City refused.

24. Woodhawk and Woodhawk II share an entrance that is gated and contains a guardhouse with a guard on duty 24 hours per day. The gated entry does not restrict access to police, fire and rubbish trucks. Police, fire and rubbish trucks are generally not impeded, except when the guard who is at the gatehouse may be absent. The Court finds that these are relatively small periods of time.

CONCLUSIONS OF LAW

1. Article I, Section 2 of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States of America require that laws be equally provided or equally applied against citizens. Limitations placed upon governmental action by the equal protection clauses of the Ohio and United States Constitutions are essentially identical. The demands that equal protection be afforded our citizens does not require that all laws apply universally to all persons.

2. The legislature, if it acts at all, may impose special burdens upon or grant special benefits to special

groups or classes of individuals. The essence of the equal protection doctrine is that both the United States and Ohio Constitutions do not require that things different in fact be treated in law as though they were the same, but it does require that in the concern for equality, those who are similarly treated or similarly situated be similarly treated.

3. Equal protection of the laws is not only a pledge that the laws be equally applied. It is also a pledge that classifications contained within governmental action be directed towards matters which are a legitimate concern of the government and be based upon distinctions which are objectively reasonable.

4. The Court finds in this case that there is no compelling governmental interest involved and that there is no suspect classification involved. Having made those findings, the Court finds that the City's policy is subject to rational basis scrutiny. Under that scrutiny, the governmental classification must bear some rational relationship to a legitimate governmental objective.

5. In reviewing the determinations made by the City, the Court is deferential. The Court is required under that finding to defer to the governmental determinations made by the City if those classifications are rationally based.

6. In this case, the Court finds the City made a distinction among certain citizens in the City. It has set up classifications different for those single family property owners who live in a condominium which do not front on a public road, and it separates that classification from those who

live in non-condominiums or live in homes or residences that do front upon public roads.

7. In making this determination, the City made several arguments. First, the City has suggested that the Plaintiffs in this case are third party beneficiaries and therefore bound by determinations or representations made by the developer of this property. The Court finds those arguments unpersuasive.

8. A third party beneficiary is one for whose benefit a promise is made but who is not a party to the contract. An intended beneficiary is one who has enforceable rights under the contract in contrast to incidental beneficiary who has no rights of enforcement.

9. The distinction between an intended and an incidental beneficiary is that the contract must be entered into with the intent to benefit the one who is the intended beneficiary. There must be an intent to benefit.

10. In making a decision on this, the Court first looks to who the parties are in that contract. In that case, the contract flows through the developer to the condominium owners. The Court finds nothing in the governing documents of the condominiums to suggest that the City is either an intended beneficiary of the purported contract between the developer and the condominium association or its members.

11. The Court finds the language contained with the Declaration of Woodhawk is insufficient to create an obligation of the individual members. Rather it is a disclosure

of potential expenses that the members may bear as opposed to an obligation on behalf of the members.

12. The Court finds the minutes of the planning and zoning commission support the Court's analysis. The minutes of the Planning and Zoning Commission meeting of March 3, 1980, at which it was indicated that the City would have no maintenance expense, specifically influence the Court. The Court finds unpersuasive the City's argument that this means the City would have no responsibility for the garbage collection obligations which the Court finds distinguishable from maintenance obligations.

13. Therefore, the Court finds no contractual agreement between the condominium members or the association and the City that would obligate the condominium owners to pay these refuse costs. The Court must now determine whether or not the actions of the City violate the equal protection rights of the Plaintiffs.

14. The Court is obligated to make a determination as to whether the City's classification bears a rational basis to a legitimate governmental basis.

15. After receiving the evidence and observing the demeanor of the witnesses, the Court finds the Plaintiffs have shown that the City does not make a legitimate distinction based upon safety concerns.

16. There are few children in this development. There is little traffic in this development and nearly no accidents in this development. The development is open to

pedestrian traffic, open to police, and open to rubbish services.

17. While the development can control the use of the roads, the development is otherwise generally open to the public. There has been no damage to garbage trucks, and no accidents involving garbage trucks despite the fact that the garbage trucks currently used by Plaintiffs' refuse service are larger than those used by the City.

18. The Court finds that the evidence taken as a whole proves there is no legitimate grounds for the distinction between condominium owners contained in the Woodhawk and Woodhawk II developments.

19. Having made that determination, the Court finds the City's policy violates Plaintiffs' rights to equal protection of the law guaranteed by the Ohio and U.S. Constitutions.

20. In considering suitable remedies, the Court finds persuasive the Defendants' suggestion that Plaintiffs delayed bringing this action after some notice that certain rights were being violated. For this reason, in equity, the City should pay Plaintiffs sums flowing from those garbage removal costs from the filing of this action which the Court calculates to be $26,000.00.

21. Defendant City shall further provide refuse pickup services to Plaintiffs in a reasonable period of time not to exceed three months.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT Defendant City's policy of refuse collection and disposal is hereby declared unconstitutional and null and void to the extent it denies Plaintiffs equal protection under the law;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendant City, its Mayor, Service Director, members of Council, other officials, agents or employees, and their successors, with the responsibility to enforce such policy, be restrained and enjoined from further failing, refusing or neglecting to pick up and collect Plaintiffs' refuse;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendant City shall commence the collection of the Plaintiffs' garbage in a reasonable period of time, but not to exceed three months from the date of the entry of this order;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendant City be ordered to pay Plaintiffs the amount $26,000.00 for damages sustained by Plaintiffs as a result of Defendants' unconstitutional actions; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Plaintiffs be awarded their costs in the prosecution of this action.

IT IS SO ORDERED.

/s/_____
Judge James S. Gwin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 24, 2000]

No. 98-4163

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, ET AL., *Plaintiffs-Appellees,*	)
v.	)
CITY OF MAYFIELD HEIGHTS, ET AL., *Defendants-Appellants.*	)

ORDER

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and BERTELSMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk